reasonable ground for the inference that it was intended by the parties that these warranties should be regarded as a condition precedent to the sale, and therefore rescission was proper."

This seems to be the only case in California which discusses or mentions the last part of the code section. It is submitted that if the sale be executed, the warranty should operate as a condition subsequent rather than as a condition precedent. In Bannerman v. White,[3] it is said: "If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken."

In Luitweiler Pumping Co. v. Ukiah, the court found that there were both express and implied warranties. Whether there can be under the section referred, a rescission of an executed sale when the warranty is implied and not expressed remains an open question. The courts have not discussed the point in this State.

It is interesting to note that North Dakota and South Dakota have adopted code provisions similar to Sec. 1786 of the California Civil Code.[4] The North Dakota court seems to allow a rescission of an executed sale for breach of warranty,[5] while the South Dakota court denies the right.[6]

Our code section is similar to Sec. 895 of the proposed Civil Code of the State of New York, which was proposed in New York in 1867 but never adopted. The section is really an expression of the rules of two English cases, Street v. Blay,[7] and Bannerman v. White.[8]

The general English rule allows a rescission of an executory sale but not of an executed sale, and this seems to be the rule of a number of jurisdictions in this country. But, on the other hand, many jurisdictions in the United States allow a rescission of an executed sale for breach of warranty.[9] It was at one time a matter of interesting controversy as to which line of decisions was entitled to claim in California,[10] but the recent cases without doubt put this jurisdiction in the class of States allowing rescission. M. C. L.

Specific Performance: Adequacy of Consideration Under Civil Code (Cal.) § 3391: Admission of Parties or Agents to Prove Adequacy.— The cases of Dore v. Southern Pacific Railroad Company and Folger v.

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[3] Bannerman v. White, 10 C. B., N. S. 844 (1861).

[4] Civil Code, North Dakota, Sec. 3988; Civil Code, South Dakota, Sec. 1340.

[5] Cauhan v. Piano Mfg. Co., 3 N. D. 229; 55 N. W. 583 (1893).

[6] Hull v. Caldwell, 3 S. D. 451; 54 N. W. 100 (1893)

[7] 2 Barn. & Ad. 456 (1831).

[8] 10 C. B., N. S. 844 (1861).

[9] Williston, Sales, Sec. 608, and cases cited.

[10] Professor Williston in 16 Harvard Law Review 465, and 4 Columbia Law Review 195; Professor Burdick in 4 Columbia Law Review 1, 264.

Southern Pacific Railroad Company[1] emphasizes the peculiar state of the California law in regard to the specific performance of executory contracts. The general American and English doctrine is that inadequacy of consideration is never a ground for refusing a decree of specific performance, unless it be so gross as to shock the conscience of the Chancellor or to amount to fraud.[2] The California rule under Sec. 3391 of the Civil Code is directly the reverse and requires the plaintiff both to allege and to prove that the consideration received by the other party was adequate, and that the contract is, as to him, just and reasonable.[3]

The plaintiffs, in the cases under discussion, applied to the court for a decree of specific performance of a contract for the sale of certain land to the Southern Pacific Railroad Company. At the time of the formation of the contract, the parties were unable to agree on the consideration to be paid for the land. They, therefore, appointed three disinterested persons to hear evidence and determine the reasonable value of the land, which determination they agreed should be binding on them. When the report of these persons was made, the defendant at first appeared to be satisfied that the same was reasonable, but later refused to pay it, claiming that it was greatly in excess of the true value of the land. In the pleadings, the plaintiffs allege, and the defendants deny, that such consideration was adequate. The only evidence introduced at the trial in regard to the adequacy of the consideration was the report of these persons and the fact, that, at first, the defendant seemed satisfied with the amount.

The court decreed the specific performance of the contract, saying in reference to the report of these three persons that, "On principle, it would appear to be at least competent evidence of value. It was the judgment of the arbitrators duly given upon the consideration of the evidence and the arguments offered by both parties bearing upon the question to be decided by them. They were selected by both parties to make the decision and were the authorized agents of both to declare it. It is a declaration by agents as to matters which the scope of their authority and made in the performance of their delegated duty. Such declarations, on familiar principles of evidence, are evidence against the principals."

It is well established in California that admissions by a principal[4]

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[1] 124 Pac. 817 (Cal. Sup., July, 1912).

[2] 2 Pom. Eq. Juris., § 926; Clark's Appeal, 57 Conn. 565; 19 Atl. 332 (1889); Dickinson v. Kempensky, 96 Mo. 252; 9 S. W. 618 (1888); Hamblin v. Bishop, 41 Fed. 74 (1889); Lathrop v. Tracy, 24 Colo. 382; 51 Pac. 486; 65 Am. St. Rep. 229 (1897).

[3] White v. Sage, 149 Cal. 615; 87 Pac. 193 (1906); Kaiser v. Barron, 153 Cal. 790; 96 Pac. 806 (1908); Stiles v. Kain, 134 Cal. 171; 66 Pac. 231 (1901); Bruch v. Tucker, 42 Cal. 353 (1871); Agard v. Valencia, 39 Cal. 302 (1870); Kelly v. Central Pac. R. R. Co., 74 Cal. 562; 16 Pac. 386 (1888); and many other cases.

[4] Swinnerton v. Argounout Land & Development Co., 112 Cal. 375; 44 Pac. 719 (1896); Herman Waldeck & Co. v. Pacific Coast S. S. Co.,

or by an agent acting within the scope of his authority,[5] are admissible to establish facts against the principal. But these decisions were for the most part rendered in cases where the agreement of the principal as to the same matter would not only be admissible, but would be much stronger evidence to establish the same fact. Under the code and the decisions in California, it seems clear that the agreement of the parties expressing the value of the property to be sold is no evidence that the consideration there determined on is fair or adequate. The principal case seems to hold, however, that admissions by the parties or their agents, as to the same matter, are admissible evidence even though the contract itself would not be competent.

M. B. K.

Statutes and Statutory Construction: Effect of Amendment: Sec. 325 Pol. Code (Cal.).—In a recent case,[1] the District Court of Appeal for the Third District, apparently accepts as law the proposition, quoted from argument of counsel, and supported by a citation,[2] that "It is well settled that a revised or amended act must be construed as a new and original piece of legislation." The language was pure obiter dictum and was entirely unnecessary to the decision, but, in view of the fact that such dicta sometimes cause confusion in subsequent cases, it is deemed worthy of comment. Not only does the citation of the earlier case given in support of this dictum fail to support it, but the proposition itself is plainly covered by the express provisions of Section 325 of the Political Code, which says. "Where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." This section has frequently been cited and followed by the courts of California.[3] An identical provision in the Montana law has been interpreted to mean that the unamended part of the statute does not repeal conflicting laws, as being later in point of time.[4] A similar decision has been reached in

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83 Pac. 158 (Cal. App., 1905); Neely v. Naglee, 25 Cal. 152 (1863); Ward v. Preston, 23 Cal. 468 (1863).

[5] Wright v. Carrillo, 22 Cal. 595 (1863); Robinson v. Dougan, 35 Pac. 902 (Cal. Sup., 1894); Burlingame v. Rowland, 77 Cal. 315; 19 Pac. 526 (1888); White v. Merrill, 82 Cal. 17; 22 Pac. 1129 (1889); Roche v. Llewellyn Iron Works, 140 Cal. 563; 74 Pac. 147 (1903); 16 Cyc. 939.

[1] Reed Orchard Co. v. Superior Court, 15 Cal. App. Dec., 247; decided September 7, 1912.

[2] Donlon v. Jewett, 88 Cal. 530; 26 Pac. 370 (1891).

[3] Estate of Martin, 153 Cal. 229; 94 Pac. 1053 (1908); City of Los Angeles v. Lelande, 11 Cal. App. 307; 104 Pac. 717 (1909).

[4] State ex rel Hay v. Hindson, 40 Mont. 353; 106 Pac. 362 (1909).